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# Supreme Court of the United States

OCTOBER TERM, 1957

No. ~~1109~~ 209

MOORE-McCORMACK LINES, INC., as charterer in possession of steamship WILLIAM S. HALSTED,

*Petitioner,*

*against*

Tank Steamship ESSO CAMDEN, STANDARD OIL COMPANY (N. J.),

*Respondent.*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ADRIAN J. O'KANE,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Moore-McCormack Lines, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on April 11, 1957.

### Citations to Opinions Below

The opinion of the Court of Appeals is not yet reported; it is printed in the record at pp. 112a-122a. That part of this opinion dealing with the question raised in this petition forms the appendix hereto and appears at pp. 13-14.

The opinions of Walsh, J. in the District Court on exceptions to the Commissioner's Report and on limited reargument are reported in 141 F. Supp. 742 (S. D. N. Y.) and printed in the record at pp. 82a-94a and 96a-97a. The

Commissioner's Report, not officially reported, appears in 1956 A. M. C. 2018 and is printed in the record at pp. 69a-77a.

## Jurisdiction

The judgment of the Court of Appeals was entered on April 11, 1957 (R. 124a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

## Question Presented

Where a shipowner admits that no pecuniary loss resulted from the detention of its tank vessel for collision repairs, can damages for loss of use be allowed on the basis of the hire provisions in a time charter of the vessel to a wholly-owned and completely controlled subsidiary, acting as a division or department of a single integrated organization?

## Statement

In consequence of her collision with the William S. Halsted, which occurred in Chesapeake Bay in November, 1946, the Esso Camden was laid up for repairs for a period of 15.986 days. At that time the Camden, owned by the Standard Oil Company (N. J.), was engaged exclusively in the carriage of petroleum products of the Standard Oil organization under an inter-company charter arrangement between the vessel owner and its wholly-owned and completely controlled marketing and refining subsidiary, the Standard Oil Company of New Jersey. This charter arrangement contained a provision for monthly advance payments of charter hire from the subsidiary to the parent owner, but the financial comptroller of the parent frankly admitted that such payments amounted to mere bookkeeping entries, inasmuch as the subsidiary was 100% owned "lock, stock and barrel" by the parent; that any payment (or refund) of charter hire was in effect "taking that money out of

one pocket and putting it into the other"; that any gain or loss of income to the parent owner under the charter was offset by an equal loss or gain to the subsidiary charterer, with one washing out the other entirely in the parent's consolidated earnings and income tax returns; that the only possibility of loss would be the cost of hiring a substitute if such had been necessary (De Witt, 55a-58a). The attempt to show the hire of a substitute vessel failed and was abandoned during the reference hearings.

The proofs adduced establish the following uncontradicted facts:

1. The Standard Oil Company (N. J.), owner of the Esso Camden, completely owned and controlled (100%) the charterer, the Standard Oil Company of New Jersey (Gumbs 20a, 34a, 39-40a).

2. The Esso Camden and the other 44 ships comprising the Standard Oil American flag fleet were used exclusively for the carriage of petroleum products in furthering the business of her owner as a single integrated organization. None of the vessels was at any time chartered in the open market to any third party (Gumbs 31a).

3. When the projected schedule for operation of the Esso Camden was interrupted for collision repairs, her commitments were carried out by re-allocation of the schedules of the other vessels of the fleet, and it was not necessary to hire any substitute then or later to carry out her engagements (Gumbs 26a).

4. The charter arrangement between parent and subsidiary was so framed as to ignore for any practical purpose the market charter value of the vessel, and admittedly was designed merely to establish a fixed transportation charge as one factor in determining marketing costs. Although the charter superficially made reference to market rates for vessel hire, such reference was actually immaterial because the vessel would not have been available for charter to outside interests (third parties) whether or not such a charter would have been more profit-

able to the owner than the amounts stated under the internal charter arrangement with the subsidiary (Gumbs 37a-38a, 44a).

5. Whenever it suited the purposes of the parent company, ownership of the tanker fleet was shifted from time to time as between the parent and subsidiary, but irrespective of the particular unit in which the vessels' ownership was vested (whether parent or subsidiary), the management and operation of the fleet, including the CAMDEN, always remained in the same Marine Department or Traffic Division without any change whatsoever in the operating personnel or the duties which they were to perform (Gumbs 15a-18a, 22a, 31a-35a, 39a).

The Court of Appeals, without even mentioning the conceded fact that no pecuniary damage resulted from the interruption of the use of the CAMDEN, erroneously held that her charter party was "prematurely terminated" and that the Commissioner was justified in looking to the "potential earnings" under the charter as a basis for ascertaining a pecuniary loss which admittedly was non-existent.

The charter party was never "terminated", nor was there ever any intention of making the vessel available for operation in the open market by charter to some third party or otherwise. The vessel, both before and after the collision, was operated strictly and solely for the transportation of Standard Oil products, and when collision repairs had been effected she continued under the same charter in the same service as before collision. The only voyage which she was scheduled to make during her detention period was carried out by one of her sister ships.

## Specification of Errors to be Urged

The Court of Appeals erred:

1. In concluding and holding that the rate of hire in the charter party constituted appropriate evidence from which to measure *damages* and in ignoring the specific ad-

missions of the owner's own financial official that no pecuniary damage actually resulted whether charter hire was paid or not.

2. In adopting a purely artificial yardstick to measure damages for the loss of use of a tanker which was not operated commercially and was restricted in its employment solely to the carriage of the products of its owner for marketing by its subsidiary as a single integrated organization.

3. In holding that the charter party was prematurely terminated as a result of the collision, in consequence of which the parent shipowner "lost" the "profits" from the non-payment (or refund) of charter hire by its wholly-owned and controlled subsidiary, despite the admission that no gain or loss resulted whether charter hire was paid or not.

## Reasons for Granting the Writ

### I. Conflict with the fundamental principles established by this Court in *The Conqueror*, 166 U. S. 110, and *Brooklyn Eastern District Terminal* v. *United States*, 287 U. S. 170.

Over 60 years ago this Court in *The Conqueror*, 166 U. S. 110 (October Term, 1896), laid down the rule that

> "* * * demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty" (p. 125).

This Court specifically pointed out that the mere fact that a vessel has been detained does not entitle her owner to demurrage in the absence of proof of actual pecuniary loss. The Court said:

> "It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least, a reasonable certainty

> of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure, or, as was said by Doctor Lushington in *The Clarence*, 3 W. Rob. 286: 'There must be actual loss and reasonable proof of the amount.' In other words, there must be a loss of profits in its commercial sense." (p. 133).

In *Brooklyn Eastern District Terminal* v. *United States*, 287 U. S. 170, a detention claim was asserted for the loss of use of the tug INTEGRITY while undergoing repairs. The owner did not let out its boats for hire generally, and when the INTEGRITY was laid up, instead of hiring an extra tug as a substitute, the work she would have done was accomplished through overtime employment of her sister tugs. It was unquestioned that the loss of use of the tug was occasioned directly by the collision, and that she would have been regularly employed throughout the detention period if she had been available, but this Court held that no pecuniary damage was shown and neither market value nor the cost of hire of a substitute were material because the tug would not have been let out for hire and no substitute was in fact employed to take her place.

## II. Conflict with decisions of the Courts of Appeal for the Fifth and the Ninth Circuits.

Where this question has arisen in both the Fifth and the Ninth Circuits, the Courts have uniformly denied a detention recovery when no actual pecuniary loss has been proved.

### A. Fifth Circuit Cases

In *The Nidarholm*, (5 Cir.) 143 F. 2d 406, the vessel was laid up for repairs at a time when she was under charter for a voyage to Denmark which was frustrated by the German invasion. The Court, in denying the claim, held:

> "The allowance of demurrage for loss of the use of a commercial vessel pending repairs arising from a

collision depends upon whether profits actually have been, or reasonably may be supposed to have been, lost. [Citing cases] Detention alone does not entitle an owner to demurrage; it must be shown with reasonable certainty that the vessel would have been employed if she had been in good repair. [Citing cases] The burden of establishing that profits were lost was upon the owners of the Nidarholm. [Citing cases] We find no such proof in record." (p. 407)

In *The Wolsum*, (5 Cir.) 14 F. 2d 371, the Court in following the rule laid down in *The Conqueror*, *supra*, held:

"Demurrage or damages for the loss of profits or of the use of a vessel pending repairs, arising from a collision, will only be allowed when profits have actually been, or may reasonably be supposed to have been, lost, and the amount of such profits is proved with reasonable certainty. *The Conqueror*, 166 U. S. 110; 17 S. Ct. 510, 41 L. Ed. 937." (p. 377)

In *Cuyamel Fruit Co.* v. *Nedland*, (5 Cir.) 19 F. 2d 489, the shipowner had refused offers to charter its vessel and it was held that no pecuniary loss was sustained, it being immaterial that the ship could have been chartered during the detention period.

### B. Ninth Circuit Decisions

In *Atchison, T. & S. F. Ry. Co.* v. *California Sea Products Co.*, (9 Cir.) 51 F. 2d 466, the Court denied a claim for lost profits arising out of the lay up of a whaling vessel which was delayed several days in reaching its fishing grounds by the necessity of repairs resulting from a collision. The Court stated:

"The well-established rule governing the award of damages in cases of this category is laid down in The Conqueror, 166 U. S. 110, 125, 17 S. Ct. 516, 41 L. Ed. 937: '* * * Demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty.

> * * * There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel.' " (p. 467)

This rule was applied in *The Beaver*, (9 Cir.) 287 Fed. 679. There, in denying recovery for detention in the absence of actual pecuniary loss caused by the owners' failure to comply with government regulations, the Court held:

> " * * but in any case, if there is no demand for the employment of the ship, and, of course, no hire to be obtained, no compensation for detention for repairs will be allowed, as no loss will have been sustained. * * * 'demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty.' 'Two things are absolutely necessary' says Dr. Lushington, 'in The Clarence, 3 W. Rob. 283, in order to entitle a party to be indemnified for what is termed consequential loss, * * * 'actual loss and reasonable proof of the amount.' " (pp. 681-682)

Likewise, in *The Tremont*, (9 Cir.) 164 Fed. 1, 2, a claim for earnings that would have been made for carriage of metal was disallowed because the profit, if any, that might thereby have been derived was not established with reasonable certainty.

## III. Confusion and doubt created by conflict with prior controlling decisions of the same Court.

The Court of Appeals for the Second Circuit in two earlier cases denied a detention recovery for the loss of use of a tanker employed by an oil company exclusively for the carriage of its own products, and the present decision creates confusion in reaching a contrary conclusion without differentiating or overruling the Court's earlier pro-

nouncements in *The Glendola*, 47 F. 2d 206; cert. den. 283 U. S. 857; and in *Sinclair Refining Co.* v. *The America Sun*, 188 F. 2d 64.*

In *The Glendola (sub nom. Standard Oil Company of New Jersey* v. *Glendola S. S. Corporation)* the same Standard Oil Company which is the respondent here was attempting to recover detention damages measured by the reasonable hire value of its tanker in the open market. The situation here and in *The Glendola* were identical, unless the subterfuge of an inter-organization charter party is to be used to excuse the necessity of establishing actual pecuniary damage. In both cases the practical situation was identical, and in both cases there was no real pecuniary loss with or without an inter-organization charter party.

In denying the detention recovery in *The Glendola*, the Court said:

> "There remains the calculation of the damages. We think that the 'demurrage' was incorrectly computed, because the libellant failed to prove specific damages, attributable to the TILFORD's detention in drydock. It is an enormous corporation, regularly employing thirty-seven vessels of its own, and chartering others. They carry its own products, and its damage lay either in the embarrassment to its business in general, or in the cost of a substitute, chartered to take the TILFORD's place * * *; the first is not provable when, as here, no definite sum can be attributed to the detention. It was certainly not enough to show the reasonable hire of such a ship as the TILFORD, measured in terms of current fixtures" (p. 208).

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* Until the present litigation, these decisions were regarded as controlling by all of the other integrated oil companies. The importance of this question and its national economic significance require an authoritative dispositon by this Court since it directly affects not only the oil-carriers but all other industries transporting their own products, such as the wine, fruit juice, chemical, ore, grain and lumber industries.

In *Sinclair Refining Co.* v. *The American Sun*, (2 Cir.) 188 F. 2d 64, the GLENDOLA doctrine was applied in respect of a vessel operated by a wholly-owned subsidiary in carrying out the transportation part of the over-all business of an integrated oil corporation even though it was established that the ship would have been used continuously had she been available for employment.

The similarity with the instant case appears from the first sentence of the Court's opinion as follows:

> "The appellant is a wholly-owned subsidiary of the Sinclair Oil Corporation and is engaged in that part of the over-all business of the corporation which consists of the purchase and refining of petroleum and the transportation and sale of it and its products" (p. 65).

Other decisions of the Second Circuit are to the same effect.

In *Navigazione Libera T. S. A.* v. *Newtown Creek Towing Co.*, (2 Cir.) 98 F. 2d 694, the Court pointed out that loss of time was not in itself sufficient to support a detention award where actual measurable pecuniary loss was not shown. The Court said:

> "The Libellant appears to suppose that there are absolute rules applicable to detention which take it out of the usual principle that damages are only for indemnity. It is at times hard to say how much an owner has lost, but no case holds, when it affirmatively appears that he had lost nothing, that he can recover" (p. 699).

In *Newtown Creek Towing Co.* v. *City of New York* (2 Cir.) 23 F. 2d 486, an idle vessel was substituted for the one damaged and no pecuniary loss was allowed despite the loss of use of the damaged vessel.

In *The Watuppa*, (2 Cir.) 283 Fed. 8, the vessel being requisitioned by the Government had no market, and no detention was allowed.

As the Court said in *The Winfield S. Cahill*, (2 Cir.) 258 Fed. 318:

> "Damages for loss of use cannot be awarded because the injured vessel might have made some profit. The question is not of the possibility of employment but of actual loss; not what possibly could have been made, but what would have been made. *The North Star*, 151 Fed. 168" (p. 321).

In that case, the vessel was not employable because she had been blacklisted.

## CONCLUSION

**For the foregoing reasons this petition for a writ of certiorari should be granted.**

Respectfully submitted,

ADRIAN J. O'KANE,
*Counsel for Petitioner.*

Dated, New York, N. Y.
June 18, 1957.

## APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 148—OCTOBER TERM, 1956

(Argued January 22-23, 1957. Decided April 11, 1957.)

DOCKET No. 24265

MOORE-McCORMACK LINES, INC., as charterer in possession of steamship WILLIAM S. HALSTED,
*Libellant-Appellant,*

*v.*

Tank steamship ESSO CAMDEN, STANDARD OIL COMPANY (N. J.),
*Claimant-Appellee.*

BEFORE:

CLARK, Chief Judge,
LUMBARD and WATERMAN, Circuit Judges.

Appeal by both parties from a commissioner's award of damages resulting from a collision where both were at fault, as affirmed and modified by the District Court for the Southern District of New York, Lawrence E. Walsh, Judge, 141 F. Supp. 742 (1956). Award to the libellant for interest and commissions on general average disbursement affirmed. Award of demurrage to the libellant modified; award to the

claimant for detention damages affirmed in part, reversed and modified in part.

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BURLINGHAM, HUPPER & KENNEDY, New York, N. Y. (Adrian J. O'Kane and Richard W. Palmer, of counsel on the brief), for libellant-appellant:

KIRLIN, CAMPBELL & KEATING, New York, N. Y. (Raymond T. Greene, Stephen J. Buckley and Ira A. Campbell, of counsel on the brief), for claimant-appellee.

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LUMBARD, Circuit Judge:

**[Extract relating to issue on appeal. Opinion printed in full at pp. 112a-122a of the Record]**

"The CAMDEN was awarded $22,181.29 detention damages. At the time of the collision, the CAMDEN was carrying oil under a charter party between owner and charterer. The charter party having been prematurely terminated as a result of the collision, the commissioner looked to the potential earnings thereunder as a basis for ascertaining loss. Because of the accident the owner of the CAMDEN was required to refund $38,395, representing a portion of the gross rate of hire which had been paid in advance by the charterer. This refund included profits and certain voyage maintenance expenses which if was agreed by stipulation would have been incurred by the owner. The commissioner therefore deducted $16,231.71, the stipulated voyage maintenance expenses, from the $38,395 refunded to the charterer in arriving at the $22,181.29 damages occasioned to the owner by the loss of use of the CAMDEN. Nothing was allowed to the CAMDEN for its maintenance expenses while laid up for repairs." (114a)

"The CAMDEN's Damages

"At the time of the collision, the CAMDEN was sailing under a charter party entered into between Standard Oil Company (N. J.) (the owner) and Standard Oil Company of New Jersey, its subsidiary (the charterer). The commissioner used the charter party rate as a basis for measuring the owner's loss from the 15.986 days detention required to make repairs. The HALSTED claims that because the charter party was entered into between parent and subsidiary the charter party rate was not a proper yardstick to be used to measure the CAMDEN's detention damages and the owner should be made to prove the cost of hiring substitute vessels. We do not agree. The charter party rate constituted appropriate evidence from which to measure damages. See The Conqueror, supra, at 132. There is no evidence that the parent overreached the subsidiary in setting the rate of hire in the charter party, which was manifestly fair, being in accord with or lower than the current market. Accordingly, we affirm the district court's consideration of the charter party rate as proper and persuasive evidence for measuring the CAMDEN's detention damages." (118a-119a)